UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/Sub.2/1992/24/Add.2
27 May 1992

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS

Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Forty-fourth session
Item 10 (d) of the provisional agenda

THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

The right to a fair trial: Current recognition and measures necessary for its strengthening

Third report prepared by Mr. Stanislav Chernichenko
and Mr. William Treat

Addendum

INTERPRETATIONS OF INTERNATIONAL FAIR TRIAL NORMS BY THE INTER-AMERICAN COMMISSION ON AND COURT OF HUMAN RIGHTS

CONTENTS

	Paragraphs	Page
Introduction	1 - 16	1
I. ARREST AND DETENTION	17 - 39	4
A. Prompt review of detention	19 - 20	4
B. Authority of the courts over detainees	21 - 30	4

GE.92-12475/4543B

CONTENTS (continued)

		Paragraphs	Page
C.	Right to habeas corpus/amparo	31 - 34	6
D.	Non-derogability of the right to habeas corpus	35 - 37	6
E.	Immediate right to counsel	38 - 39	7
II.	TREATMENT DURING PRE-TRIAL DETENTION AND IMPRISONMENT	40 - 49	7
A.	Prohibited treatment	42 - 44	7
B.	Prohibition of prolonged incommunicado detention	45 - 46	8
C.	Prison/detention conditions	47 - 49	8
III.	NOTICE	50 - 53	8
IV.	RIGHT TO RELEASE PENDING TRIAL	54 - 59	9
V.	COUNSEL	60 - 72	10
A.	Right to select counsel	61	10
B.	Right to appointed counsel	62 - 63	10
C.	Right to adequate counsel	64 - 68	10
D.	Opportunity to prepare a defence	69 - 72	11
VI.	HEARING	73 - 100	11
A.	Protection of civil suits	75 - 77	12
B.	Right to prompt trial	78 - 79	12
C.	Equal access and opportunity to present evidence	80 - 83	13
D.	Right to interpretation	84 - 85	13
E.	Right to be presumed innocent	86 - 87	14
F.	Right not to be compelled to confess guilt or to testify against oneself	88 - 93	14
G.	Right to call and examine witnesses and to be present at trial	94 - 97	14
H.	State actions constituting punishment which require a hearing	98 - 100	15

CONTENTS (continued)

		Paragraphs	Page
VII.	DECISION	101 - 125	15
	A. Independence of the judicary	103 - 116	15
	B. Right to a public trial	117 - 118	18
	C. Right to have judgement made public	119	18
	D. Right to benefit from lighter penalty	120	18
	E. Prohibition of second trial for same offence	121	18
	F. Prohibition of group trials	122	18
	G. Sentencing and punishment	123 - 125	18
VIII.	APPEAL	126 - 132	19
IX.	REMEDIES	133 - 138	20
X.	NON-DEROGABILITY	139 - 145	21

Introduction

1. The Inter-American Commission on Human Rights has interpreted the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man, elaborating the rights necessary for a fair trial.

2. The Inter-American Court of Human Rights, through its adjudicatory and advisory jurisdiction, has also examined violations of human rights related to a fair trial, albeit in only a few cases.

3. Although the Inter-American Commission has considered many cases and country situations alleging violations of rights in the trial process, the Commission's reports and decisions do not provide a large number of specific rules or detailed decisions on the right to a fair trial. Often, the situation in which the cases arise places the Commission in the position of "reminding" various Governments that individuals have the right to a fair trial. The Commission infrequently has the opportunity to identify aspects of the right which has been violated. Instead, the Commission usually deals with cases where no trial at all has been granted to an individual.

4. Of the cases reported in the Commission's annual reports, only a small number, mostly from Jamaica, have afforded the Commission the luxury of looking at the judicial process of the country cited by the petitioner. 500/ In the Jamaican cases, the petitioner was represented by counsel and the transcripts of the court proceedings were supplied upon request to the Commission. In these cases, the Commission generally found that the Jamaicans had received a fair trial. These decisions demonstrate the Commission's willingness to look at a country's judicial system, if the situation allows. These decisions also indicate the Commission's endorsement of systems where court records are kept and available, petitioners are represented by counsel, etc. If a fair judicial system is in place, then the Commission appears rarely to find against the existing judicial system.

5. The following are brief summaries of a sample of the cases in which the Commission resolved that the right to a fair trial was violated. Some of the Commission resolutions concerning the right to a fair trial are found to be violations of either (and sometimes both) article XVIII (Right to a fair trial), and article XXVI (Right to due process of law) of the American Declaration of Rights and Duties of Man. 501/ Others cite the American Convention on Human Rights, article 8, Right to a fair trial and article 25, Right to judicial protection. 502/

6. In Case 1757 (Bolivia) (June 1974), 503/ a number of citizens were detained without trial. The Bolivian Government admitted to having a number of the people in custody, viewing them as extremists. The Government stated that the people were being held pending investigations of the charges and did not view the incarceration as repression. The Commission found, among other violations, the violation of the right to a fair trial and the right to due process under the American Declaration.

7. In Cases 1758, 1759, 1762, and 1763 (Paraguay) (June 1973), 504/ people who were arrested and detained without being informed of charges were not given trials. Some had been imprisoned for as long as 13 years at the time of the complaint to the Commission. Among the violations the Commission found were the violation of the right to a fair trial and the right to due process under the American Declaration.

8. In Case 1783 (Uruguay) (January 1978), 505/ a young university student died while in the custody of the Uruguayan armed forces. The autopsy showed signs of torture and the young man had died from wounds suffered during his detention. During its investigation, the Government of Uruguay ordered another autopsy. The examining magistrate who had jurisdiction to investigate found both autopsies to be flawed and found it impossible to make any definitive judgement concerning the death of the student. The Commission found that although judicial processes had been exhausted, the Government still had an obligation to conduct a thorough and impartial investigation and to punish those responsible. Among the rights violated were the right to a fair trial and the right to due process under the American Declaration.

9. In Case 1944 (Haiti) (May 1977), 506/ the Commission received a complaint that 74 individuals had been held - many for several years - in detention without trial. The Haitian Government responded that much of the information, including the names of the detainees, was falsified and that the Commission should more fully investigate allegations before bringing them before Governments. The Commission noted that the Government had provided information on only one of the named 74 prisoners. The Government was found in violation of a number of rights, including the right to a fair trial and the right to due process under the American Declaration.

10. In Case 2088 (Argentina) (November 1978), 507/ the kidnapping of a former senator was denounced in a petition to the Commission. In its communication to the Government, the Commission pointed out that it appeared the senator had been kidnapped and later detained without charge due to the state of siege. The communication also stated that he was about to be called before the courts of the nation. In fact, the Government, after holding him for nine months, expelled the senator. The Commission found the right to a fair trial under the American Declaration among the rights violated.

11. In Case 2126 (Chile) (June 1978), 508/ a chemist was detained by members of DINA, the National Intelligence Bureau, who were assisted by carabineros. In reply to a writ of amparo, the courts were informed by DINA that there were no records of the detention. The Government failed to provide any information concerning the detention of the missing man. The Commission resolved that among the violations were the violation of the right to a fair trial and the right to due process under the American Declaration.

12. In Case 2299 (Cuba) (June 1981), 509/ a Cuban citizen was arrested and sentenced to 15 years in prison without benefit of a trial. He was imprisoned for eight years during which time he was tortured. He spent two more years in a work camp before he was released. He was later rearrested and imprisoned

although he had not committed any crime. The Cuban Government failed to answer the inquiries of the Commission. The Commission resolved that among the violations were the violation of the right to a fair trial under the American Declaration.

13. In Case 9038 (Guatemala) (October 1984), 510/ courts of special jurisdiction sentenced a number of people to death by firing squad. The Commission cited the lack of guarantees to the individuals who were executed. It found the courts had violated the provisions established by the American Convention due to their lack of independence, impartiality and discretion as well as by failing to uphold the universally accepted rules of due process. The innumerable procedural defects in the court procedures included a lack of necessary independence and impartiality essential to an organ in charge of administering justice; the refusal to grant the defendants, in the course of their trials, adequate means to prepare their defence; denial of the right to communicate freely and privately with counsel and to interrogate witnesses or experts; and, in many cases, compelling the defendants to declare themselves guilty and incriminate themselves. They were also denied the right to appeal, at least in the first trials, and were refused the right to a public trial. On the contrary, the trials were secret.

14. In Case 9265 (Suriname) (July 1985), 511/ the military police arrested 10 people who were accused of plotting a coup d'état. Refugees from Suriname reported that the prisoners were tortured and that some had died while in custody. The Surinamese Government did not address the accusations of torture in their answer to the Commission. The allegations were denied orally by government officials in interviews conducted during an on-site visit. In the view of the Government, the prevailing state of siege in the country justified the arrests. The Commission found, however, that the decree laws in force prima facie violated the non-derogable right to due process. The Commission cited the violation of the right to due process among the violations by the Government of Suriname. The Commission denied the request by the Government for redetermination in October 1985.

15. In Case 9619 (Honduras) (March 1987), 512/ an attack by the Honduran army against Salvadorian refugees resulted in two deaths (including a baby), 50 wounded, 15 apprehended, 2 women raped and 7 tortured. The Commission found that the Honduran Government had failed to respond adequately to the Commission's inquiries. The Commission stated that the situation, safety and integrity of the refugees was the responsibility of the Honduran Government. The Commission found among the violations the right to due process under the American Convention.

16. Some cases, special country reports and yearly country reports of the Commission as well as decisions of the Inter-American Court provide more detailed analysis of fair trial rights. The Commission's and the Court's interpretation of the rights associated with the fair trial provisions contained in the American Convention and the American Declaration are examined below.

I. ARREST AND DETENTION

17. The American Convention on Human Rights [hereinafter American Convention] contained several provisions guaranteeing individuals specific rights in the trial process. Article 7 (1) of the Convention guarantees every person the right to personal liberty and security. Articles 7 (2) and 7 (3) prohibit unlawful and arbitrary arrest and imprisonment. Under article 7 (5), a detainee must be brought promptly before a judge or officer authorized to exercise judicial authority and is entitled to a trial within a reasonable time. Article 7 (6) guarantees the detainee the right to have a competent court decide without delay on the lawfulness of the arrest or detention and order release if the arrest or detention is unlawful.

18. The American Declaration of the Rights and Duties of Man [hereinafter American Declaration]also sets forth several rights in the trial process. Article XVIII provides every person with the right to resort to the courts to ensure respect for his legal rights. Article XXV guarantees that any person deprived of liberty has the right to have the legality of the detention promptly reviewed by a court. Article XXV also prohibits detention except according to procedures established by pre-existing law. Under article XXV no person may be deprived of liberty for non-fulfilment of a purely civil obligation.

A. Prompt review of detention

19. The Commission has apparently not defined the precise period which would qualify as a "prompt" review of a person's loss of liberty. The Commission called a five-day delay in responding to a habeas corpus writ "very long". 513/ It also found a law authorizing a 15-day detention without judicial review to be a violation of a detainee's rights. Under that law an order for provisional detention could be obtained solely on the basis of evidence presented by public security bodies. 514/ The law allowed public security bodies 15 days to investigate the case of a detainee. Since it was not required that a judge check the evidence supporting the provisional order, the detainee could be held for 15 days without judicial review; this procedure was found to violate the detainee's right to prompt review. 515/

20. The Commission prohibits indefinite pre-trial detention. The Commission has held that failing to set a timelimit for the release of a prisoner held without charges or for annoucing the nature of the accusations violates the detainee's rights. 516/ In addition, if the time a detainee is held before trial exceeds the period he or she would serve if convicted and sentenced, the detention is a serious violation of the detainee's right to be charged and convicted before being punished. 517/

B. Authority of the courts over detainees

21. The right to due process applies equally to all segments of the population. Vesting military officials in Nicaragua with the authority to detain Miskitos "without following legal formalities and without allowing any judicial remedy" constitutes a flagrant violation of the Miskitos' due process rights. 518/

22. The courts must be able to exercise control over detention and to require authorities detaining an individual to obey decisions to release a detainee. Failure to release a prisoner after a writ of dismissal has been issued constitutes an illegal detention. 519/

23. The court must be promptly informed of persons being held in detention. One purpose of judicial control of detention is to safeguard the well-being of the detainee and prevent any violation of his/her fundamental rights. The Commission found that if the court is not informed of the detention or is informed after a significant delay following the date of the arrest, the rights of the detainee are not protected and the detention violates the detainee's right to due process. 520/

24. Failure to recognize "the obligation to submit the detained person to a judge" or to recognize "a timelimit for the release of a prisoner without charges, for annoucing the nature of the accusations, for notifying the family of the arrest or informing them of the place of detention" violates the detainee's right to judicial guarantees. 521/

25. The Commission encouraged Governments to take three steps to ensure judicial control of detainees. First, it called on Governments to establish a central registry containing a record of all persons who have been subject to imprisonment. Second, it urged Governments to ensure that detention is administered exclusively by competent and duly identified authorities. Third, it requested that detainees be kept in custody in places established for such purpose. 522/

26. The names and whereabouts of all detainees should be made known to the court and to their families. Failure to release the whereabouts of a detainee is an obstruction of justice which prejudices the detainee's right to legal guarantees. 523/ The Commission welcomed the Guatemalan Government's efforts to ensure that the name of anyone detained in Guatemala, regardless of the arresting authority, was reported to a Detainee Control Registry. The Registry replaced a previous recording system which registered only persons turned over to the courts and not those detained by police, security, or armed forces. 524/

27. The Commission noted that the family of the detainee must receive timely notice of the arrest and place of detention. 525/

28. An authority who makes an arrest "without such constitutional requisites as a warrant from a competent authority and formulation of charges being fulfilled" seriously infringes the individual's right to legal guarantees. 526/ Issuing an arrest warrant after an individual has been detained does not remedy the violation of the individual's due process rights. 527/

29. The arrest of a person by paramilitary groups or security forces in civilian dress who present neither the appropriate identification nor an arrest warrant issued by the competent authorities constitutes an arbitrary arrest and violates the individual's due process rights. 528/

30. Places used for detention should not only be identified as such but should meet certain minimal requirements which every prison should satisfy. 529/

C. Right to habeas corpus/amparo

31. The Commission has urged that at all times the judiciary should have the power to intervene to stop executive action resulting in arbitrary detention. 530/ The Commission maintains that through amparo and habeas corpus proceedings the judiciary should be able to review the decisions of the executive branch as to the reasonableness of an arrest. 531/

32. The Commission found that a law empowering the President to order an arrest and detain an individual for an extended period without the right to habeas corpus or review by a court, violates the detainee's right to due process. 532/

33. The right to habeas corpus is jeopardized when the court denies the petition on the basis that the person's whereabouts are unknown. The Commission welcomed a Guatemalan measure to ensure the effectiveness of habeas corpus proceedings when the person's whereabouts were unknown. The Government instructed judges who denied petitions for habeas corpus on the ground that the person was missing to initiate an immediate investigation of the disappearance to determine the whereabouts of the missing person. 533/ Prior to implementation of the new measure a judge would close the case when a petition for habeas corpus was denied because the person was presumed missing, could not be located or was not found in detention.

34. The State must permit appeal of a petition for habeas corpus. During a state of siege the Supreme Court of Paraguay disqualified itself from hearing writs of habeas corpus. The Commission found that if the Supreme Court abdicated its power to review the petitions, the right to habeas corpus was violated. 534/

D. Non-derogability of the right to habeas corpus

35. The Inter-American Court, in an advisory opinion, held that habeas corpus is a non-derogable right under article 27 (2) of the American Convention. 535/

36. Suspension of the habeas corpus remedy, "the only legal mechanism to prevent incommunicado imprisonment" infringes a detainee's right to judicial guarantees. 537/* The Commission found that it is a serious violation of an individual's right to remedies for deprivation of liberty when an individual is denied the right of habeas corpus during a State's exercise of special or, exceptional powers, or during a state of siege. 538/

37. The Commission affirmed Nicaragua's recognition of habeas corpus as non-derogable during a state of emergency. It declared, however, that habeas corpus must be available to detainees irrespective of the lawfulness of the arrest. The Nicaraguan law associated habeas corpus petitions with "unlawful arrest" and "illegal detention". The Commission found that in order to protect the personal safety of the individual, a petition for habeas corpus must be allowed whether or not the person is unlawfully arrested or detained. 539/

---

* Note 536 has been deleted for technical reasons.

E. Immediate right to counsel

38. The accused must be allowed to obtain legal counsel when first detained. The Commission examined a law allowing a detainee to appoint a lawyer only after the court had granted a provisional arrest order. The law meant that a detainee could not have counsel during the period of administrative arrest and investigation. The Commission noted that decisive evidence may be produced during this initial period and held that the lack of legal advice during this first part of the trial could seriously impinge upon the right to defence. 540/ In addition, ensuring access to an attorney prevents possible abuse of other fundamental human rights.

39. The Commission noted that incommunicado detention "is not in keeping with the constitutional guarantees or the standards with respect to human rights". The situation "creates an atmosphere conducive to other illegal practices, particularly torture ...". 541/

II. TREATMENT DURING PRE-TRIAL DETENTION AND IMPRISONMENT

40. Article 5 (1) and 5 (2) of the American Convention on Human Rights guarantee respect for the physical, mental and moral integrity of the person and prohibits torture or cruel, inhuman or degrading punishment or treatment.

41. Article XXV of the American Declaration guarantees every person the right to humane treatment during the time he is in custody. Article XXVI prohibits cruel, infamous or unusual punishment.

A. Prohibited treatment

42. A detainee may not be denied medical treatment while in custody. The Commission found that refusing for two weeks to allow independent doctors to examine detainees violated the detainees' right to humane treatment in detention. 542/ Denying a diabetic necessary medication is a serious violation of the right to humane treatment in detention. 543/ When a detainee is old and in ill health, the Government is obligated, for purely humanitarian reasons, "to provide him all necessary medical care and to establish his legal status posthaste." 544/

43. Both physical and psychological torture seriously infringe the prohibition against torture. 545/

44. The right to humane treatment under article 5 of the American Convention includes the right to be free from government actions which harm a person's reputation. A prominent member of a Nicaraguan opposition party brought a libel suit against a Nicaraguan magazine for reporting that he had received money from the United States Central Intelligence Agency. During the trial, the judge lost the petition and suspended the case. The Commission found that the Government had sanctioned the magazine report and harassed the man's attorney to hinder his work in the libel suit. 546/ The Commission held that the Government, by authorizing the magazine report and then preventing the victim from defending himself through the court system, had violated the right to humane treatment under article 5 (3) and the right to a remedy under article 25.

B. Prohibition of prolonged incommunicado detention

45. Incommunicado detention, particularly for a long period, violates article 5. The Inter-American Court, considering the case of a disappeared man, found that "prolonged isolation and deprivation of communication are themselves cruel and inhuman treatment ... and a violation of the right of any detainee to respect for his inherent dignity ... and therefore violates article 5." 547/

46. Detainees must be allowed contact with their lawyers as well as their families. 548/ Also, a time limit for incommunicado detention must be set. 549/ Incommunicado detention for 14 days is too long and violates the right to humane treatment. 550/

C. Prison/detention conditions

47. Article 5 (4) guarantees an accused person the right to be segregated from convicted persons save in exceptional circumstances, and the right to separate treatment appropriate to his/her status as an unconvicted person.

48. Overcrowding a prison violates both the rights of prisoners and unconvicted persons. The Commission observed the prison conditions in Panama where a prison for 250 housed 789 people. The Commission stated that overcrowding violates "the prison population's rights to a minimum living condition." 551/ In addition, the Commission found that article 5 (4) of the American Convention provides that unconvicted prisoners should be separated from convicted prisoners and that both should be afforded conditions which respect human dignity.

49. Detention facilities which are overcrowded, filthy and primitive and which also fail to provide space for recreation activities, violate a detainee's right to humane treatment. 552/

III. NOTICE

50. Article 7 (4) of the American Convention provides that anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him. Article 8 (2) (b) also guarantees notification in detail of the charges against the accused.

51. A person must receive notice of charges before making any statement. Failure to give accused persons "prior and detailed information of the charges brought against them before making their statements" violates their right to notice. 553/

52. The Commission found that a general charge of criminal association against members of the Nicaraguan National Guard lacked the specificity needed to uphold convictions in many cases. The Commission's decision arose from its examination of cases decided by the Nicaraguan Special Tribunals which were established to try military personnel, officials and civilian employees, or persons associated with them, of the regime of General Somoza. In many cases, persons convicted of being members of the National Guard under Somoza were found to have necessarily committed the crime of "association with criminal

intent" and "the crime against international order". The Commission found that general accusations of this kind, without mention of specific charges, did not constitute a triable offence but required release. 554/ The Commission emphasized that members of an institution may not be made generally responsible for acts committed by some members. 555/

53. The Commission found that it is a flagrant violation of the right to notice when prisoners are not informed of the status of their trials, the period of detention or the sentences. The Commission held that prisoners should have access to such information as the date on which their sentence is to end, when their detention officially began and when they are eligible to be released before the end of their sentence. 556/ In a specific case, it was found to be a serious violation of the right to notice to have sentenced an individual to six months' imprisonment without informing him of his sentence. 557/

IV. RIGHT TO RELEASE PENDING TRIAL

54. Article 7 (5) of the American Convention states that a person must be tried within a reasonable time or released without prejudice to the continuation of the proceedings. The release may be subject to guarantees to assure appearance at trial.

55. Article XXV of the American Declaration provides that every person has the right to be tried without undue delay or released.

56. The Commission has not declared the precise time when detention becomes excessive and requires release. In Paraguay the court failed to indict a prisoner for several months without the possibility of release and thus violated the detainee's rights to personal liberty. 558/ The average pre-trial confinement in Panama was two to four years; such lengthy pre-trial detention violates an individual's right to trial within a reasonable time or to be released while proceedings continue. 559/

57. A judicial stay in proceedings for an unidentified period which subjects the accused to continuing detention, violates the accused's right to due process. An Argentine man charged with violating security laws remained in detention 11 months awaiting trial. The court granted a provisional stay in the proceedings and continued to hold the man in detention. The Commission found that prolonged detention without a specified term and without justified cause is an unreasonable restriction on liberty and violates articles XXV and XXVI of the American Declaration. 560/

58. Similarly, the Commission expressed concern that a Haitian law dealing with offences against the head of State or first lady did not provide the accused with the right to release on bail while the case was pending although such cases take years to complete. 561/ The law should provide a right to release on bail.

59. The Commission strongly disapproved of the imprisonment of accused persons for longer periods than their eventual sentence resulting from a delay in handing down final judgement. 562/

V. COUNSEL

60. Article 8 of the American Convention outlines several guarantees associated with the right to counsel. Article 8 (2) (c) guarantees the accused the right to adequate time and means for the preparation of a defence. Article 8 (2) (d) recognizes the accused's right to defend himself personally or to be assisted by legal counsel of his/her own choosing. The accused must be permitted to communicate freely and privately with counsel.

A. Right to select counsel

61. The court may not appoint counsel when the accused asks to select his/her own defence attorney. The Commission considered a Cuban case in which the court deemed an accused's request to select his own defence attorney unnecessary and appointed a defence attorney. The Commission found the appointment violated the accused's right to choose his own defence. 563/

B. Right to appointed counsel

62. Article 8 (2) (e) guarantees the right to be assisted by counsel provided by the State, paid or not as the domestic law provides, if the accused does not defend him/herself personally or engage his/her own counsel.

63. The Commission has considered several cases where Jamaicans convicted of murder and sentenced to death have alleged a violation of their right to a fair trial. In each case the petitioner was represented by counsel and the transcripts of the court proceedings were supplied upon request to the Commission. In these cases, the Commission generally found that the Jamaicans had received a fair trial. These decisions indicate the Commission's endorsement of systems where court records are kept and available, petitioners are represented by counsel, etc. 564/

C. Right to adequate counsel

64. A State may not take any actions which jeopardize an attorney's ability to defend a client. The Commission found that state intimidation of defence attorneys through arrests, the threat of sanctions against attorneys and demanding that the attorney "avoid use of defence motions that prevent justice from fulfilling its social function" prejudice a defendant's right to defence. 565/ Also, refusing to renew a lawyer's licence may undermine the right to counsel and may not be accomplished without a hearing. 566/ In Suriname the deaths of four lawyers, one who was the President of the Bar Association and others who were defending persons accused by the Government, created a climate of fear which made it impossible to form a new board of directors of the bar or to find lawyers willing to represent persons accused by the Government. The Commission found that this climate together with the Government's refusal to provide counsel for accused who could not find counsel seriously impaired the right to counsel. 567/ A judge may not use his/her authority to dissuade or intimidate attorneys from challenging the judge, openly expressing grievances and challenging judicial rulings on appeal. 568/

65. A civilian brought before a military court has the right to choose his/her own counsel and may not be compelled to accept someone appointed by the military. It is a serious violation of the right to defence when civilians are placed under military jurisdiction and are not allowed to choose their own defence attorney, but are assigned official military defenders who are not licensed lawyers. 569/

66. Counsel must be permitted to be present when the accused gives a statement, is interrogated, or when s/he signs a statement. 570/

67. The Commission found that formally prohibiting attorneys from visiting their clients in military hospital violates the rights to defence and counsel. 571/

68. Counsel must be allowed to bring papers and make notes when seeing a client in prison. 572/

D. Opportunity to prepare a defence

69. The accused must have notice of the trial date and of the charges sufficient to prepare a defence. Failure to inform the accused and his/her lawyer of the trial until the day of the trial, and to fail to inform the lawyer of the charges against the accused until the time of the trial, violate the right to counsel and to prepare a defence. 573/

70. The time set for trial must allow the accused sufficient time to investigate and prepare a defence. The Commission found that a time period of six weeks from the initial questioning and investigation through sentencing denied the accused adequate time and means for the preparation of a defence. 574/ During the investigation, the accused was detained incommunicado for 30 days. He said he was allowed only several minutes to prepare his defence with his lawyer. The Commission found that rapid proceedings denied the accused his rights under article 8 (2) (c).

71. It is a violation of the right to counsel when the defendant is not allowed to consult with counsel until only one hour before the opening of the trial or even until the beginning of the trial itself. 575/

72. An attorney preparing an appeal must have access to the evidence which the court considered in making its decision as well as the court's reasoning in arriving at the judgement. The Commission examined a case where defence counsel had access to the case file but where the real elements of the judgement were not in the file because the information had come from a secret source. In addition, military judges and prosecutors failed to set forth the reasoning or justification for the decision in their judgements and reports. The Commission found the actions violated the defendant's right to counsel. 576/

VI. HEARING

73. Article 7 (5) of the American Convention provides that every person who has been detained has the right to be brought promptly before a judge and the right to trial within a reasonable time or to release. Article 8 (1) provides

that every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his/her rights and obligations of a civil, labour, fiscal or any other nature.

74. Article XXIV of the American Declaration recognizes every person's right to submit respectful petitions to a competent authority for a general or private interest and the right to obtain a prompt decision. Article XXVI recognizes the right to be presumed innocent until proven guilty. The court must make a decision in accordance with pre-existing laws.

A. Protection of civil suits

75. Article 8 (1) of the American Convention guarantees the right to a fair trial in both criminal and civil suits. Similarly, article XXIV of the American Declaration recognizes the right to a fair trial to determine a "private interest", that is, when the trial concerns a civil matter. Article XXV provides that no person may be deprived of liberty for non-fulfilment of a purely civil obligation. Article 7 (7) of the American Convention states that no one shall be detained for debt. In addition, American Convention article 25 guarantees the right to a judicial remedy for protection against acts that violate fundamental rights.

76. Although the Commission's cases and report examine fair trial rights primarily in criminal cases, the Commission has applied the scrutiny and fair trial standards developed in its criminal cases to non-criminal cases. 577/ The Commission's decisions suggest that the fair trial guarantees articulated in criminal cases would apply in appropriate civil cases.

77. The Inter-American Court also held that due process guarantees apply in non-criminal cases. In an advisory opinion the Court held that the principles of due process embodied in article 8 must be applied to the judicial remedies described in article 25 and that these judicial remedies are offered when any right guaranteed by the Convention is violated. 578/

B. Right to prompt trial

78. The Commission found that to determine what is meant by trial within a "reasonable length of time", it must consider the circumstances of each case. The Commission examined an Argentine law which permitted a judge to release a detainee if judicial proceedings exceeded two years. 579/ A man held for over four years during two separate proceedings for murders claimed the prolonged detention did not constitute a "reasonable period" under Argentine law and article 7 (5) of the Convention.

79. The Commission decided that the Argentine law did not violate the reasonable period requirement because a State is not bound to fix a period for release which applies to all cases independently of the circumstances. The Commission cited as authority a European Court case that took the seriousness of the violation into consideration in determining whether the detention had ceased to be reasonable. 580/ The European Court considered three factors to

determine the "reasonableness" of the detention: (a) the duration of imprisonment; (b) the nature of the crimes; and (c) the difficulties encountered during the trial. Applying the three factors to the Argentine's case, the Commission found that: (a) the severity of the crimes and the sentence they carried did not make the detention unreasonable and (b) where the accused's actions - not an unjustified delay in the administration of justice - caused the delay, the extended detention that resulted was not unreasonable. 581/

C. Equal access and opportunity to present evidence

80. At trial, an accused must be allowed sufficient time to present evidence. Where defence counsel had only eight days to submit evidence to the court and the prosecutor had as much time as he needed, the trial violated the defendant's right to defence. 582/

81. When government authorities refuse to perform an autopsy relevant to the case, they violate the accused's right to an independent and complete investigation. 583/

82. The authority to classify information secret should be restricted and regulated by the courts. The Commission found that granting the armed forces and police broad power to provide or withhold evidence within its jurisdiction from civilian courts blocks the proper functioning of the judicial system. A law adopted in Chile "during the reporting period [1987-1988]" allowed the military and police to classify a wide range of documents as secret documents and to withdraw them from the courts when it affected the security of the State. 584/

83. A tribunal cannot render an independent and impartial decision if it is restricted from considering evidence submitted by private parties and can only consider public documents. The Commission examined an electoral law passed by a state in Mexico which created a tribunal to review complaints in the electoral process but provided that only public documents could be considered in evidence. 585/ A political party challenging the law noted that public documents could only be issued by local officials and that those officials were subject to the control of the Government. The party claimed that the adjudication allowed the Government and ruling party to serve as both judge and participant in electoral complaint proceedings and to have the final word on complaints. The Commission found that the limitation of evidence to public documents was outside legal norms and that the law must be changed to comply with the article 8 requirement of an independent and impartial tribunal. 586/

D. Right to interpretation

84. Article 8 (2) (a) provides the accused with the right to be assisted without charge by a translator or interpreter if s/he does not understand or does not speak the language of the tribunal or court.

85. The right to an interpreter applies not only at trial but during pre-trial investigation and proceedings. Denying an individual an interpreter during questioning violates the defendant's right to an interpreter. 587/

E. Right to be presumed innocent

86. Every person has the right to be presumed innocent. The Government of Chile refused entry to a Chilean citizen it believed was a member of a revolutionary group. The Commission found that denying him entry on the basis that he was highly dangerous and a member of the revolutionary group violated his right to be presumed innocent and to a fair trial. 588/

87. Reversal of the burden of proof and placing the burden on the defendant to prove he is not guilty violates the right to be presumed innocent until proven guilty. 589/

F. Right not to be compelled to confess guilt or to testify against oneself

88. Article 8 (2) (g) guarantees the accused the right not to be compelled to be a witness against himself or to plead guilty. Article 8 (3) provides that a confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

89. A confession obtained during a 30-day incomunicado detention was invalid, whether or not pressure was used to extract the confession from the accused. The Commission considered the case of a Nicaraguan solider detained on espionage charges who claimed that the self-incriminating statement he made during his 30-day detention was given under duress and therefore invalid. The Nicaraguan Government argued that there was no actual pressure on the accused, except the pressure of the detention and investigation; the accused allegedly chose to make a statement and the accused could not maintain that the confession was extracted under pressure. 590/ The Commission held that a confession obtained during a period of incommunicado detention violated articles 8 (2) (g) and 8 (3) and was invalid. 591/

90. Forcing a detainee to sign a blank sheet of paper in advance of any proceeding violated the right to a fair hearing. 592/

91. The suspension of a statute protecting a defendant from testifying against himself or his family seriously violated the defendant's right not to be compelled to testify against himelf. 593/

92. Televising confessions by prisoners evidences a violation of the prohibition against compelled confessions and is itself a violation of the prisoners' rights. 594/

93. In a Special Court, when the defendant is required to give a categorical answer to all the charges against him, the defendant's right to a fair hearing is violated. 595/

G. Right to call and examine witnesses and be present at trial

94. Article 8 (2) (f) guarantees the accused the right to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts.

95. The court must ensure that a detainee appears in court when summoned. When the defendant is detained and is unaware of the charges, is ignorant of what the witnesses have said and that the investigation, trial and sentencing are held without his presence, his right to examine witnesses and to present his defence are seriously impaired. 596/ Failure to obtain the accused's appearance interferes with the legal process and denies the accused the right to a hearing and to prepare a defence. 597/

96. Creation of an environment of fear, to the extent that the defence is afraid to present witnesses "to contradict accusations made by the State" seriously prejudices the defendant's right to present witnesses in his/her own defence. 598/

97. The prosecution's failure to call witnesses who might have been able to testify in favour of the accused about the events in question seriously prejudices the defendant's right to present his/her defence. 599/

H. State actions constituting punishment which require a hearing

98. Article 5 (3) declares that punishment shall not be extended to any person other than a person convicted of a criminal offence.

99. Expulsion is punishment and cannot be ordered without a fair trial. A Paraguayan writer was expelled from his country by an administrative decree for painting political slogans on walls. The Commission found that the liberty of persons includes the liberty of remaining in the country of citizenship. Since expulsion denies this liberty and can be ordered for an indeterminate length of time, it is a more onerous sanction than being sentenced for a crime and requires the guarantees of a fair trial. 600/

100. The detention and subsequent expulsion of a German priest from Guatemala without a trial violated articles 7, 8 and 25 of the Convention. 601/

VII. DECISION

101. Article 8 (1) of the American Convention gives every individual the right to a hearing before a competent, independent and impartial tribunal previously established by law.

102. Article XVIII of the American Declaration provides every person with the right to resort to the courts to ensure respect for his/her legal rights. Article XXVI recognizes the right to an impartial public hearing.

A. Independence of the judiciary

103. Trying civilians for political crimes before military courts violates the right to a hearing before an independent and impartial tribunal. In its report on Nicaragua the Commission found the military courts were handling proceedings affecting basic rights and that regular courts were not investigating violations. Accordingly, the Commission found violations of the rights to a fair trial and due process. 602/ The Commission also found that

the Government classified political crimes as military offences so as to subject civilians to the jurisdiction of military courts and that this action substantially jeopardized the individual's right to a fair hearing by a competent tribunal. 603/

104. The Commission noted several obstacles facing the judiciary which prevent autonomous and efficient administration of justice: the suspension of constitutional guarantees, the absence of judicial norms which ensure authentic decision-making and independence of the judiciary; the lack of political or police support in implementing decisions; inadequate protection for judges against vengeance and professional reprisal; and unwieldy legislation causing long delays in trial. 604/

105. The Commission noted with approval three measures by Paraguay to enhance there independence of the judiciary. 605/ First, Paraguay separated the judiciary from the executive branch and governing party. Second, the Government appointed politically independent jurists as well as opposition party members to the Supreme Court. Third, Paraguay introduced an amendment to change the term of judges from a five-year term that was subject to executive discretion for renewal to a stable career system. 606/

106. The Commission recommended the appointment of permanent magistrates to safeguard the independence and impartiality of the judiciary. 607/ Magistrates and judges should not be removed without cause. It found that judicial independence was threatened when executive or military authorities "assume the power to remove any sitting judge without prior judgement or complaint of misconduct ...". 608/ In addition, judges should not be subject to removal by superior judges. 609/ It also recommended staggering the appointment of Supreme Court judges to prevent the executive from "packing" the court and diminishing its independence. 610/

107. The right to the independence of the judiciary includes the right to be free from hostility and arbitrary interference in the exercise of judicial functions including the work of public prosecutors. 611/

108. Where the prosecution is in charge of special prosecutors appointed by the President whose identities are unknown but who could be lawyers or army officers, the defendant's right to a procedurally fair hearing is prejudiced. 612/

109. Placing prisoners at the disposition of the chiefs of police who "act as judges and may order arrests, through summary procedures", without even hearing the accused in some cases, merges the judicial function into the authority of military bodies and denies the accused their due process rights. 613/

110. A Truly autonomous judiciary must be able to investigate and try senior officials and authorities who may be involved in crimes. The Commission noted with disappointment that several government authorities in Paraguay tried and sentenced for participating in the theft of millions of dollars from the Central Bank remained free. 614/

1. Requirement that decision be based upon the evidence

111. The judge must make a decision based upon what has come before him/her and independently of other judges. The Commission found that when a judge consults other judges in order to reach a collective agreement regarding a problem, instead of reaching a decision independently, the court violates the accused's judicial guarantees. 615/ When there "is no introduction of evidence and the sentence is imposed, without any objective criteria, by the unilateral decision of the police judge", the defendant is denied the right to hearing by a competent, independent and impartial tribunal. 616/ When evidence is presented at trial but the court's decision is based solely on the conscience and equity of the court, the decision violates the defendant's right to a fair hearing. 617/

112. The Commission found that it is a serious violation of the right to an impartial hearing when judges consult the opinion of higher authorities in making a decision in order to ensure that their decisions are upheld. 618/

113. Rules of evidence and not the personal convictions of judges must be used to weigh the evidence. 619/ The Commission held that the free admission of evidence and the discretionary evaluation of that evidence by the (Nicaraguan) Special Tribunal, with no restrictions on what evidence should be admitted or kept out, is conducive to judicial error and prejudices the defendant's right to a fair trial. 620/

2. Publicity prejudicing the trial

114. State acts which create public bias against an accused violate the right to a fair hearing. The Commission examined the use of solicitations to obtain evidence. Government authorities placed advertisements in newspapers with photos of the accused containing definite implications that the accused were the authors of the crimes charged. It found that the State had jeopardized the defendant's right to a procedurally fair hearing. 621/

115. Televising incriminating confessions made by defendants before a final verdict is rendered "leads public opinion to prejudge the guilt of the defendants" and seriously violates the "fundamental dictates of due process". 622/

3. Recusal

116. The requirement of impartial judges requires a judge to recuse him/herself if s/he has some connection with the case which may bias the decision. Control of a criminal investigation by government officials who are relatives of the accused constitutes a clear conflict of interest and infringes the right to an independent and impartial investigation. 623/ If military courts are "composed of officers involved in the repression of the same crimes they are judging ...", their impartiality is suspect. 624/

B. Right to public trial

117. Article 8 (5) of the American Convention requires that criminal proceedings shall be public, except in so far as may be necessary to "protect the interests of justice".

118. The Commission found that secret proceedings of a military tribunal trying army personnel for the death and serious injury of two citizens denied the victims due process of law. The secrecy made it virtually impossible for the victims' lawyers to gain access to basic elements of the trial and allowed military authorities to control the evidence submitted. The Commission held that these military judicial proceedings abused the recourse to secrecy. 625/ In another case, it found the failure to publicize Special Court trials in the plenary stage violated the right to a public hearing. 626/

C. Right to have judgement made public

119. There are no decisions known at this time which elaborate this right.

D. Right to benefit from lighter penalty

120. Article 9 of the American Convention prohibits courts from applying an ex post facto law and declares that if subsequent to the commission of the offence the law provides for a lighter penalty, the guilty person shall benefit from it.

E. Prohibition of second trial for same offence

121. Article 8 (4) of the American Convention provides that an accused person who has been acquitted shall not be subjected to a new trial for the same cause.

F. Prohibition of group trials

122. Group trials, where numerous individuals are tried together but sometimes given different sentences, undermine an individual's right to a fair hearing and preclude "a more individualized consideration of their cases." 627/

G. Sentencing and punishment

123. Article 5 (6) of the American Convention provides that punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

124. Article XXV of the American Declaration guarantees the right to humane treatment while in custody.

125. When a Special Court automatically doubles the penalty indicated in the relevant law and applies the death sentence to a large number of offences that previously were not punished so severely, the prohibition against excessive punishment is violated. 628/

VIII. APPEAL

126. Article 8 (2) (h) guarantees the right to appeal a judgement to a higher court.

127. A court must stay execution of the sentence while the case is on appeal. The Commission found that executing the death penalty while the sentence is on appeal violates the defendant's right to appeal. 629/

128. The right to due process requires full judicial observance of all rights, not only during the investigation and trial at the lower court but in all stages of appeal or review. In a case submitted by an Argentine citizen, the Commission found that the guarantee of due process requires a court on appeal to examine whether or not due process was observed by the lower court. 630/ The Argentine man, imprisoned after conviction for politically motivated offences, sought an appeal of his 1979 conviction and life sentence. He claimed that the trial court had violated his due process rights and had used a confession obtained under torture. Although the first trial occurred in a military-influenced court, when a constitutional court reviewed his case it denied a new trial. The Supreme Court also denied his petition for review. In denying a review, the Supreme Court reasoned that the appeal brief failed to provide a basis on which to order an investigation and review.

129. The Commission found that the reviewing courts failed to consider and protect the petitioner's due process rights. According to the Commission, enforcement of the judicial guarantees in article 8 (1) and article 25 (1) require more than "mere formal verification of procedural requirements". It noted that the record before the reviewing courts showed many indications that the convicted man had been imprisoned on evidence illegally obtained under coercion. 631/ The Commission held that during the appeal process courts must examine not only the grounds for appeal but whether or not due process had been observed throughout the judicial proceedings. 632/

130. When evidence indicating the innocence of an accused is discovered after the person is tried and convicted, the case must be reconsidered in light of the evidence. A man convicted of murder and sentenced to death in Jamaica subsequently discovered evidence that showed he could not have committed the murder. The evidence came from the pathologist's testimony at the trial but neither the defence nor the court took notice of the exculpating evidence. On appeal, the court denied review without considering the new evidence. The Commission held that the appeals process must permit a correction. 633/

131. The right to appeal must provide a genuine review of the case and must be timely. It is a violation of the right to appeal when, although the right exists by law, the political chief of the locale either routinely confirms the sentence imposed by the police judge, or the sentence has already been served by the time the appeal has been decided by the Supreme Court. 634/

132. It seriously undermines the right to appeal to threaten a defendant with a longer sentence if s/he appeals. 635/

IX. REMEDIES

133. Article 7 (6) of the American Convention guarantees anyone who is deprived of his/her liberty the right of recourse to a competent court so that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. Article 10 provides every person with the right to be compensated in accordance with the law in the event s/he has been sentenced by a final judgement through a miscarriage of justice. Article 25 provides every individual the right to simple and prompt recourse to a competent court for protection against acts that violate his/her fundamental rights under the American Convention or under the laws and constitution of the State.

134. Article XVIII of the American Declaration provides that there should likewise be available to each person a simple, brief procedure whereby the courts will protect him/her from acts of authority that, to his/her prejudice, violate any fundamental constitutional rights.

135. A person convicted of a crime has the right to seek pardon, amnesty or commutation of sentence. The Commission considered a law in Suriname which empowered the "cadres of the national army" to try and sentence an individual to death. It found that where the decision to impose the death penalty is mandatory and unappealable the law, the individual's right to seek pardon, amnesy or commutation of sentence is prejudiced. 636/

136. When a government official who is accused of violating human rights is tried, convicted and sentenced in accordance with current legal provisions, there is no violation of the Convention. The Inter-American Court considered a case where a Costa Rican civil guard was accused of violating the human rights of three prisoners by assaulting them and ultimately killing one prisoner. 637/ After criminal charges were brought against the guard he was tried, convicted, sentenced and incarcerated. The Inter-American Court found the petition alleging a violation of the victim's rights inadmissible where the Government of Costa Rica acted in conformity with the law and punished the person responsible with full force. 638/

137. A judicial remedy to victims of human rights violations must uphold the rules of due process and all rights guaranteed by the Convention. The Commission noted that States have a legal duty to provide remedies to victims of human rights violations under article 25. The Commission concluded that these remedies must be pursued in accordance with the rules of due process of law (art. 8 (1)) and guarantee the free and full exercise of the rights recognized by the Convention. 639/

138. A State must ensure that a remedy is effective in practice. The Inter-American Court examined a complaint alleging that Honduras had violated articles 4 (right to life), 5 (right to humane treatment) and 7 (personal liberty) in the disappearance of a Honduran school teacher. The Government maintained that the complaint was inadmissible and that domestic remedies had not been exhausted. A petition for habeas corpus was filed but officials denied holding the school teacher. The investigating judge accepted this

response and discontinued consideration of the petition. Honduran law required the identification of the place of detention and the authority ordering the detention in a writ of habeas corpus. The Commission noted that although the remedy of habeas corpus existed it was not effective for finding a person clandestinely held by state officials. The Commission cited the State's obligation under article 25 and article 46 (1) to provide an effective remedy. 640/ A remedy is not a true remedy unless it is effective in practice and produces the expected result. 641/ The Commission noted three examples of procedural requirements which make the remedy of habeas corpus ineffective: "if it is powerless to compel the authorities; if it presents a danger to those who invoke it; or if it is not impartially applied". 642/ The Inter-American Court found that Honduras had failed to provide effective remedies to guarantee the individual's rights under articles 4, 5 and 7. 643/

X. NON-DEROGABILITY

139. Article 7 (6) of the American Convention provides that where the laws of a State provide that anyone who believes him/herself to be threatened with deprivation of liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat; this remedy may not be restricted or abolished. The interested party, or another person on his/her behalf, is entitled to seek these remedies.

140. Article 27 allows a State to derogate from its obligations under the Convention during certain times of public emergency. Article 27 (2) states that the suspension does not apply to several provisions, including article 5 (right to humane treatment) or article 9 (freedom from Ex Post Facto laws), or to the judicial guarantees essential for the protection of such rights.

141. Article 30 of the American Convention provides that any restrictions on the enjoyment of rights recognized in the Convention may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

142. In an advisory opinion, the Inter-American Court distinguished temporary suspension of obligations under article 27 from the restrictions which could be applied under article 30. 644/ The Court found that restrictions "in accordance with laws" means the restrictions must be established by a law passed by the legislature in accordance with the constitution of the State. The Court emphasized the importance of the consent of the people in placing any restrictions on a State's obligations. 645/

143. In another advisory opinion, the Inter-American Court was asked to determine the judicial guarantees essential for the protection of non-derogable rights under article 27 (2). 646/ The Court noted that article 25 requires States to provide effective judicial remedies to victims of human rights violations and reasoned that where the judicial remedies relate to rights not subject to derogation under article 27 (2), such remedies are necessary for the protection of these rights and are non-derogable. 647/ The Court found that the non-derogable judicial guarantees include habeas corpus, amparo and any other effective remedy before judges or a

competent tribunal designed to guarantee the rights not subject to derogation under article 27 (2). 648/ The Court held that the principles of due process of law expressed in article 8 must be observed when providing judicial remedies and therefore are non-derogable when providing the essential judicial guarantees. 649/

144. The Commission maintains that the working of the judiciary should not be inhibited during states of emergency. Recognizing that emergency situations may arise which justify use of extraordinary measures, the Commission urged States not to grant powers to the central Government or a government organ which inhibits the judiciary from reviewing government measures. 650/

145. The Commission expressed concern that suspensions and restrictions in effect during the state of siege deny individuals the right to exercise remedies that provide judicial protection for elementary rights whose exercise may not be impaired. 651/